The detention order was dated 30 April 1990. The appellant was then taken to the rehabilitation centre but the centre refused to accept him because there was an error in the spelling of his name in the said detention order. Whereupon the appellant was kept at the police station in police custody until 5 May 1990 after which he was sent to and received by the said detention centre. During the period that he was detained in the police station a copy of the detention order was taken from him and was later returned to him with the correction in the spelling of the name which correction was purportedly initialled by the proper authority.

Two main issues were raised by the appellant before the learned judicial commissioner and before this court in support of the contention that his continued detention was unlawful.

The first issue relates to the correction made to the spelling of the name of the appellant in the detention order. The mistake in the spelling occurs only in respect of the alphabet 'C' which should be 'G' in that the correct name is 'Ang Ghee Seng' and not 'Ang Chee Seng'. The question was whether the detention order was rendered defective by reason of the spelling order being corrected after the expiry of the 60 days prescribed under s 3(2) of the Act.

The mistake in the spelling of the name was obviously a typing error and in all the documents pertaining to the detention, the I/C number of the appellant was correctly referred to in every one of them. Since the error was clearly typographical, the learned judicial commissioner was correct in rejecting the appellant's argument. The validity of the detention order was not affected by the typographical error.

The second issue is more substantive, that is whether the detention in police custody for five days pending the correction of the spelling mistake in the detention order was lawful.

It was argued on behalf of the appellant that the journey was completed when the appellant reached the rehabilitation centre and the continued detention of the appellant other than at the said rehabilitation centre after the completion of the journey would be unlawful and not covered by the new s 6A(1)(a)(iii) of the Act.

The new provision referred to was the direct result of *PP* v *Koh Yoke Koon*[1] which was an appeal against the order of habeas corpus granted by the trial judge where this court upheld the ruling of the trial judge that the period of detention in police custody at the Muar police station was unauthorized.

The new s 6A(1)(a)(iii) makes it clear that no detention order shall be rendered invalid or inoperative by reason that the subject was during the duration of the detention order on journey in police custody (or any other custody) to the place of detention referred to in the detention order. The intention of the amendment was not to render unlawful the detention where the detainee is detained elsewhere in police custody during the journey to the place of detention. The journey is completed only when the detainee is received by the rehabilitation centre.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Newacres Sdn Bhd v Sri Alam Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-117-91
JEMURI SERJAN CJ (BORNEO), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
18 OCTOBER 1991

Civil Procedure — Dismissal of action — Application for — Issues of fact which could only be decided at trial proper — Claim for arbitration — No objection to recourse to court — Various steps taken in proceedings — Arbitration Act 1952, s 6 — Rules of the High Court 1980, O 33 r 2 & O 18 r 11

Arbitration — Referring disputes to arbitration — No 'Scott v Avery' clause — Whether failure to refer matter to arbitration means there is no cause of action — No objection to recourse to court — Steps having been taken in court proceedings

The appellant in this case had applied to dismiss the respondent's action against them on two grounds: (a) that the respondent was suing for payment of money while the contract was being performed; (b) that the respondent had not referred the dispute between the parties to arbitration. The application was dismissed in the High Court and the appellant appealed.

Held, dismissing the appeal:

(1) There were several issues in this case which must be proved by extrinsic evidence. As such, these are matters that ought to be tried at the trial proper and they cannot be decided by recourse to O 33 r 2 read together with O 18 r 11 of the Rules of the High Court 1980.

(2) In this case the appellant had not objected to the recourse to the court by the respondent and had taken various steps in the proceedings and even agreed for the case to be set down for trial. Even if the appellant were to apply for stay of the proceedings in the High Court under s 6 of the Arbitration Act 1952, his application would have failed.

[Bahasa Malaysia summary

Perayu di dalam kes ini telah memohon supaya tindakan responden terhadap mereka dibuang atas dua alasan: (a) responden telah menuntut bayaran wang sedangkan kontrak masih dilaksanakan; (b) responden tidak merujuk pertikaian itu untuk timbangtara. Permohonan telah ditolak di Mahkamah Tinggi dan perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Terdapat beberapa isu di dalam kes ini yang perlu dibuktikan dengan keterangan ekstrinsik. Oleh kerana itu ada beberapa perkara yang perlu dibicarakan di dalam perbicaraan sebenar dan perkara-perkara itu tidak boleh diputuskan dengan membuat rujukan kepada A 33 k 2 dibaca bersama dengan O 18 k 11 Kaedah-Kaedah Mahkamah Tinggi 1980.

(2) Di dalam kes ini perayu telah tidak membantah terhadap perkara itu diputuskan oleh mahkamah dan telah pun mengambil beberapa langkah di dalam prosiding itu dan telah bersetuju supaya kes itu ditetapkan untuk perbicaraan. Jika perayu memohon untuk penggantungan prosiding di Mahkamah Tinggi di bawah s 6 Akta Timbangtara 1952, permohonannya pasti akan ditolak.]

Cases referred to

1 *Hubbuck & Sons Ltd* v *Wilkinson Heywood & Clark Ltd* [1899] 1 QB 86 (refd)
2 *Everett* v *Ribbans & Anor* [1952] 2 QB 198 (refd)
3 *Brian Pty Ltd* v *United Dominions Corp Ltd* [1983] 1 NSWLR 490 (refd)
4 *Jenyns* v *Public Curator* (Q) (1953-54) 90 CLR 113 (refd)
5 *James Birtchnell & Anor* v *The Equity Trustees, Executors and Agency Co Ltd & Anor* (1928-30) 42 CLR 384 (follld)
6 *New Zealand Netherland Society Oranje Incorporated* v *Kuys & Anor* [1973] 2 All ER 1222 (follld)
7 *Tufton* v *Sperni* (1952) 2 TLR 516 (refd)
8 *Cooke* v *Gill* (1872-73) 8 LR CP 107 (refd)
9 *Read* v *Brown* (1889) 22 QBD 128 (refd)
10 *Letang* v *Cooper* [1965] 1 QB 232 (refd)
11 *Radstock Co-operative & Industrial Society Ltd* v *Norton-Radstock Urban District Council* [1968] Ch 605 (follld)
12 *Windsor Refrigerator Co Ltd* v *Branch Nominees Ltd* [1961] Ch 375 (refd)
13 *Dobbs* v *The National Bank of Australasia Ltd* (1935) 53 CLR 643 (not follld)
14 *Booker* v *Wilson* (1982) 43 ALR 68 (distd)
15 *Scott* v *Avery* (1856) 5 HLC 811 (not follld)
16 *Heyman & Anor* v *Darwins Ltd* [1942] All ER 337 (distd)
17 *West London Dairy Society Ltd* v *Abott* Law Times Vol XLIV Ch D 376 (follld)

Legislation referred to

Arbitration Act 1952 s 6
Rules of the High Court 1980 O18 r 11, O 33 r 2

Appeal from: Originating Summons No C189 of 1985 (High Court, Kuala Lumpur)

Lim Kean Chye (*Haji Mohamed Ismail bin Mohd Shariff* and *KH Koh* with him) for the appellant.
G Sri Ram (*V Manokaran* with him) for the respondent.

Cur Adv Vult

Jemuri Serjan CJ (Borneo) (delivering the judgment of the court): This is an appeal against the judgment of Anuar J given on 21 March 1991 dismissing the appellant's application to dismiss the respondent's action commenced by Originating Summons No C189/85. There were two objections raised by learned counsel for the appellant in the court below: (1) that the plaintiff was suing for payment of money while the contract was being performed, and (2) that the plaintiff had not referred the dispute between the parties to arbitration.

For the sake of convenience, the term 'appellant' is used as a reference to the defendant and the term 'respondent' to the plaintiff in Originating Summons No C189/85. Before us, learned counsel for the appellant who also appeared for the appellant in the court below, advanced the same two grounds to support his arguments that this appeal should be allowed. He complained that the learned judge was wrong in dismissing his objections, purporting to act under O 18 r 19 of the Rules of the High Court 1980 because of the delay on the part of the appellant in making the application to strike out the suit. It would appear from the judgment that the learned judge in fact decided that under O 18 r 19 the application should be made as early as possible and should not be made at a very late stage, particularly at a stage when the case was ready for trial. In this respect, we would point out that the learned judge was led to believe that the application to dismiss the suit was indeed made under O 18 r 19 because learned counsel himself in his submissions before the learned judge apparently relied on O 18 r 19 and on the ground that the cause of action was vexatious and frivolous. The notes of proceedings in the High Court provide evidence that O 18 r 19 was cited by learned counsel for the appellant. There was no indication from the notes of proceedings that the appellant's application was not made under O 18 r 19 and it made no reference at all to O 33 r 2. We are all familiar with O 18 r 19 and O 33 r 2 which do not deal with the same subject matter. If there is any assistance at all that could be obtained from the notes of proceedings in the lower court on this aspect of the case it is to be found on p 77 in Vol I of the record of appeal where learned counsel for the respondent in his reply adverted to O 33 r 2 as being discretionary, perhaps with some innate perspicacity, he concluded that the appellant's case was one under O 33 r 2.

Rule 2 gives the court discretionary power to order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, to be tried before, at or after the trial of the cause or matter and may give directions as to the manner in which a question or issue shall be stated. If learned counsel for the appellant relied on O 33 r 2, in the first place, there should be an application for an Order under r 2 and if the court allows the application, then the court may give direction as to the manner in which the question or issue shall be stated. From the notes of proceedings, there was no evidence of such application under r 2 and no order expressly given and no directions as to the manner in which the question or issue is to be stated. It would appear as if at the hearing in the High Court on 26 November 1990, learned counsel for the appellant opened his case by stating the two preliminary objections, ie arbitration and that the action is not sustainable and it would also appear that the court allowed the

learned counsel to make submissions on the two objectives without any regard to the provisions of the Rules of the High Court 1980 and, surprisingly, without objections by learned counsel for the respondent. This is another disturbing feature of this case. Under the circumstances, we do not consider that the learned judge was wholly to be blamed for making the obvious mistake.

Secondly, learned counsel for the appellant complained that the learned judge was wrong in holding that the appellant was relying on s 6 of the Arbitration Act 1952 (Act 93) on the question of arbitration when the learned judge said: '...if the defendants wish to have the matter referred to arbitration they should do so before taking any steps in the proceeding.'

Learned counsel also complained that the learned judge was wrong in holding that the respondent had a cause of action in fiduciary duty without regard to the true nature of the claim of the respondent as was evident from the Originating Summons No C189/85.

It is evident both from the notes of proceedings in the High Court and in the arguments of learned counsel for the appellant before us that the application in the lower court was in respect of O 33 rr 2 and 5 read together with O 18 r 11 because at the time when this application was argued before the High Court, the pleadings had been closed and that the date of the trial of the issues had already been fixed. Furthermore, in the appeal before us, learned counsel for the appellant made no reference at all to O 18 r 19 nor to O 33 r 2 but was arguing his case on the basis that there was no cause of action in the originating summons since the contract had not been terminated. It must have been in the mind of learned counsel for the appellant that it was too late for him to apply to strike out the originating summons under O 18 r 19 at that stage and the only proper recourse would be to apply for the trial of preliminary matter on the question of law before the trial of the issues. Hence, this application must come within the purview of O 33 rr 2 and 5 read together with O 18 r 11, although he never alluded to these two Orders.

Two courses are open to the appellant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the respondent to relief. One method is to raise the question of law as directed by O 33 r 2 read together with O 18 r 11 and the other is to apply to strike out the statement of claim under O 18 r 19. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that a judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the respondent to what he asks. (See *Hubbuck & Sons Ltd* v Wilkinson, *Heywood & Clark Ltd*[1] per Lindley MR at p 91.) We would therefore consider this appeal and make our decision on the basis that this is an application for the trial of preliminary issues before the trial itself. We would interpolate to say that O 33 r 2 is suitable if there is a point of law which, if decided in one way, is going to be decisive of litigation and the advantage should be taken of these facilities. (See *Everett* v *Ribbands & Anor*[2] at p 206 per Romer LJ.)

It is pertinent at this stage to consider the nature of the suit under Originating Summons No C189/85. This is a very unusual case with a chequered history to boot. Originally, the respondent took out a writ in Civil Suit No 30 of 1985 against five defendants, viz Newacres Sdn Bhd, the present appellant, Chan Teik Huat, Metroplex Bhd and Tan Sri Dato' Ibrahim bin Mohammed claiming, inter alia, against the appellant for:

(a) an account of all sums belonging to the plaintiff in the possession of or converted by the first defendant;
(b) an injunction perpetually to restrain the first defendant from selling, transferring, disposing of or encumbering such number of buildings and the land thereof as are lawfully due to the plaintiff and are under construction or to be construed upon the said land;
(c) a mandatory injunction compelling the first defendant to transfer to the plaintiff all buildings and the land thereof to which the plaintiff is lawfully entitled.

On 10 January 1985 the respondent took out a notice of motion in the said Civil Suit No C30 of 1985 seeking injunctions against the appellant and four other defendants in that suit. The motion for injunctions came on for hearing before Abdul Razak J on 21 January 1985 in open court and a consent order was made staying the action upon certain terms. Term No 4 of the consent order required the respondent to apply to the court for an appropriate construction and interpretation of the joint venture agreement as to the respective entitlements of the parties thereunder, with liberty to the respondent to lead evidence on the existence or otherwise of a collateral contract and without prejudice to the rights of the appellant in respect thereto. Hence, pursuant to this order, the respondent took out Originating Summons No C189/85 on 2 October 1985. In this originating summons the respondent applied for the following reliefs:-

(1) a declaration that upon a proper construction and interpretation of the joint venture agreement in writing dated 2 October 1980 and entered into between the plaintiff and defendant abovenamed herein read together with the antecedent collateral agreement thereto, the plaintiff is entitled to a sum of not less than $226,336,730.59 less all sums received by the plaintiff from the defendant as at the date of the order to be made upon this summons;
(2) alternatively, an order that the defendant do pay all moneys or convey all lands and buildings that are due to the plaintiff upon a proper construction of the joint venture agreement in writing dated 2 October 1980 read together with the collateral agreement antecedent thereto;

(3) alternatively, for an order that this honourable court do declare the entitlement of the plaintiff under the joint venture agreement dated 2 October 1980 read together with the collateral agreement antecedent thereto;
(4) an order that the defendant do pay interest on the amount determined to be due and owing to the plaintiff from the dates on which such sums became payable at a rate the plaintiff would have been able to secure from a commercial bank for fixed deposits; and

such further or other consequential orders or reliefs.

Consequent upon the issue of this originating summons, the appellant took out on 16 January 1986 a summons-in-chambers to strike out the respondent's originating summons. It was not clear under what Order the appellant took out the originating summons, whether it was under O 18 r 19, or under O 2. At the hearing of this summons-in-chambers, strangely enough, then learned counsel for the appellant, Mr Chin Yew Meng, told the court that he was not suggesting that the action be dismissed because no allegation of fraud or deceit was relied upon but merely suggesting that the matter be stayed and for questions to be formulated by the parties and hence no order was made on the appellant's summons to strike out the originating summons. Instead, by consent, the respondent undertook to file a list of issues and the appellant to file questions or issues which he considered relevant. On 17 January 1986, the managing director of the respondent filed an affidavit in compliance with the consent order made on 16 January 1986 setting out 17 issues which the respondent considered relevant for the determination by the court, and on 18 February 1986, he filed another affidavit and included therein an additional issue so that by then the respondent had identified 18 relevant issues to be determined by the court. Thereupon, the appellant also filed an affidavit in reply. Eventually, all in all there are 11 affidavits altogether from both parties containing replies and counter-replies.

Apparently, a meeting of the parties attended by learned counsel for the respondent and the appellant was called by Razak J on 17 November 1986. The learned judge decided that since the dispute related to facts which were seriously disputed he directed that the parties should exchange pleadings. Again, on 11 March 1987, the learned judge called for another meeting of learned counsel for the respondent and the appellant and at that meeting he ordered the respondent to file a statement of claim and the appellant to file a statement of defence and counterclaim. On 27 March 1989, the respondent filed the amended statement of claim which runs into 19 paragraphs with several sub-paragraphs added to some of the paragraphs. The appellant filed his statement of defence on 28 November 1989 traversing the various issues raised in the amended statement of claim. There are 19 paragraphs in the statement of defence and several sub-paragraphs as well. On 24 January 1990, the respondent filed his re-amended reply and re-amended defence to set off the amended counterclaim running into eight pages. Summons for directions were filed by the respondent and on 19 June 1987, an order was made,inter alia, that the suit would be set down for trial within 30 days from the date of the order. It was common ground that the pleadings had been closed and the date of the trial had been fixed. The application for the trial of preliminary issues before Anuar J was heard on 27 November 1990.

It is convenient at this juncture to revert to the statement of claim and to look at the nature of the reliefs claimed by the respondent and the grounds for the reliefs. The statement of claim contains 19 paragraphs and runs into 15 pages. The reliefs sought in the statement of claim are as follows:

(1) a declaration that the defendant has acted in breach of its fiduciary duties;
(2) a declaration that the plaintiff is entitled to receive from the defendant a sum of not less than $189, 341, 378.88;
(3) alternatively, for an order that this honourable court do assess a sum of money or other entitlement which the plaintiff is entitled to receive from the defendant;
(4) an order that the defendant do pay compound interest at the rate of 8% with monthly rests on the amount determined to be due and owing to the plaintiff from the dates on which such sums became payable on the footing of wilful default;
(5) a consequential order that the defendant do pay to the plaintiff (together with interest as aforesaid) all sums declared by this honourable court to be so payable as aforesaid;
(6) costs of this suit;
(7) further or other relief.

The statement of claim itself includes by consent of the respondent the issues that were ordered to be formulated by Razak J on 16 January 1986. These issues appear in para 18 of the statement of claim and there are 18 such issues.

For the purpose of this appeal, we do not consider it necessary to reproduce all the issues raised in the statement of claim but it would be sufficient just to refer to a few relevant issues which would determine whether the suit should be dismissed on point of law. Paragraph 8 of the amended statement of claim alleges that the respondent entered into the joint venture agreement and transferred the land to the appellant in reliance upon a representation and a collateral warranty by Tan Sri Ibrahim bin Mohammed and Chan Teik Huat, and by para 18(a) and (b) the respondent raised the issue whether there is such a collateral agreement between the respondent and the appellant antecedent to the joint venture agreement, and whether the respondent is entitled to a sum of $226,730.59 after the deduction of a sum of $46,910,651.12 which had already been paid by the appellant to the respondent. Paragraph 8 was sup-

ported by what the respondent described as *substance of case* where it was stated that (a) income tax of $95,616,015 was levied on the respondent by the Department of Inland Revenue for the year 1981 on the basis that the respondent was entitled to receive from the appellant a sum of $236,252,030, and (b) the respondent had received from the appellant a sum of $46,910,651.12. By paras 12 and 13, the respondent states that the dispute between the respondent and the appellant relates to the implementation of the joint venture agreement by the appellant, and by reason of the joint venture agreement and by reason of all the circumstances of the case, the appellant is, at all material times, under a fiduciary duty to act honestly, reasonably and fairly and in all his dealings with the respondent. The respondent alleges that at all material times the appellant had acted in breach of his fiduciary duties and gives particulars thereof. By para 17, the respondent contends that the appellant had acted in breach of his fiduciary duties owed by the respondent and therefore claims the sum of $189,341,378.88. There are other issues in the statement of claim that had been traversed by the appellant which, in our view, by their very nature require proof by extrinsic evidence as they involve questions of fact as well and not solely questions of law.

It was the case of the appellant in the High Court which he assiduously maintains before us that as the contract in respect of the joint venture agreement entered into between the appellant and the respondent on 2 October 1980 where the appellant, referred to as the 'developer', undertook to develop the land belonging to the respondent, has not been terminated, the respondent, strictly as a matter of law, has no cause of action. In other words, the cause of action is premature and therefore no relief in the form of payment of money can be made. There is no termination of the contract and neither is there a breach of the contract. It is still in force; at least in 1985 when the action was commenced by the respondent. In fact, the parties are still going with the contract as at the present moment.

The proposition advanced by learned counsel for the appellant is that a party to a contract cannot go to court while a contract is being carried out and ask for payment without provision in the contract for him to do so. In this case there is no such provision in the agreement between the parties and in order to entitle him to damages for breach of contract, the respondent must first terminate or rescind the contract. The respondent's case, taking it at its face value and without examination, is at the very worst an allegation of anticipatory breach of contract by the appellant.

It was argued, therefore, by learned counsel for the appellant that there is no breach of contract where the matters complained of are anticipatory and therefore there is no cause of action. The corollary to this proposition is there are no damages available. It is clear that from the appellant's point of view the respondent's complaints and the existence and allegation of breach of fiduciary duties are nothing but red herrings, nebulous in character and lacking in specific details and particulars to constitute a cause of action.

We do not wish to go through the whole statement of claim and the statement of defence and the reply to the statement of defence and counterclaim because the appellant and the respondent had spawned a wide spectrum of complex issues which involve both question of law and question of fact. It would suffice to clarify here what seems to be a misconception on the part of learned counsel for the appellant. Nowhere in the statement of claim is there any allegation of breach of contract and any claim for damages for the breach. What is clear from the statement of claim is that the respondent seeks a declaration that it is entitled to payment of a certain agreed sum on the true construction of the joint venture agreement. When the payment is to be made, or whether the payment is due or not, is another matter to be decided at the trial. We are only concerned here with whether the respondent has a cause of action.

It is not out of place to reiterate that at the meeting of the litigating parties on 27 November 1986 called by Razak J the learned judge clearly informed the parties that their disputes involved facts which were themselves disputed and hence he ordered that they exchanged pleadings. It is the first indication that the matter before us is not a matter dealing solely with question of law, the determination of which would dispose of the suit. The respondent in para 8 of the amended statement of claim alleges that it entered into the joint venture agreement and transferred the land to the appellant on account of a representation and a collateral warranty. Surely, this is a case where extrinsic evidence must be adduced and the truth or otherwise of the allegation be established. Secondly, with regard to para 18(a) and (b) the question whether a collateral agreement between the parties exists or not is a matter to be proved by evidence and cannot be decided by looking at the agreement alone. Similarly, whether the respondent is entitled to a sum of $189,341,378.88 after deduction of a sum of $46,910,651.12 on the true construction of the joint venture agreement must, by its very nature, be proved by extrinsic evidence. The appellant argued that the respondent is not entitled to any payment because there is no provision for such payment in the agreement, but in this regard we are faced with the problem that in the statement of claim, the respondent claimed that he had received from the appellant a sum of $46,910,651.12. If there is any substance in learned counsel's submissions on this question how this sum was paid in the first place must be explained aliunde

and if such payment is disputed then again oral evidence is inevitable. These issues, in our view, would, by themselves, be sufficient to constitute a cause or causes of action to justify a trial. Similarly, whether the respondent is entitled to any relief consequent upon any declaration which the appellant may obtain is again dependent upon evidence to be adduced by the respondent and it would not be proper for us at this stage to make any observation on it.

Learned counsel for the appellant disputed the existence of fiduciary duties arising out of the joint venture agreement and in fact in the appellant's statement of defence it averred that the agreement is not a true joint venture agreement but, in substance, a sale and purchase agreement for the sale of the said land by the respondent to the appellant where the purchase price is to be paid, partly in cash and partly in kind, ie allocation of units of houses and other buildings to the respondent. Therefore, all the complaints made by the respondent in para 13(b) of the statement of claim relating to the particulars of breach of fiduciary duties, particularly paras (v) and (vi) could not be regarded as such breach. Paragraphs (v) and (vi) read as follows:

> (v) Taking steps to ensure that the plaintiff will receive little or no benefit from the said development by:
>
> (1) informing the plaintiff that there was no money due to it when in fact there was;
> (2) applying formulae to obtain for itself an unjust and undue benefit or income by way of interest;
> (3) depriving the plaintiff of interest lawfully due to it by concealing from the plaintiff the interest received by the defendant from defaulting purchasers of the buildings constructed on the said land.
>
> (vi) Placing a construction upon the terms of the joint venture agreement which to the knowledge of the defendant was wrong and thereby depriving the plaintiff of its entitlement under the joint venture agreement.

In any case it was argued that the law of fiduciary duty is not the same as the law of trust.

With respect to the question of fiduciary relationship between the parties, learned counsel for the respondent referred us to the definitions of 'Trust' and 'Trustee' in the Specific Relief Act 1950 (Act 137) where fiduciary ownership and fiduciary character are included. It is the respondent's case that a fiduciary relationship is established between the appellant and the respondent when they entered into the joint venture agreement. He supported his proposition by citing the Australian Supreme Court case of *Brian Pty Ltd* v *United Dominions Corp Ltd.*[3] Samuels JA at p 506 says that after reviewing the authorities, he is of the opinion that joint venturers owe to one another the duty of utmost good faith due from every member of a partnership towards every other member. In the same case Hutley JA at p 496 has this to say on this subject:

> Though joint venture agreements are common, particularly in the resource development field, there is little authority as to the responsibilities of the joint venturers, inter se. In *Canny Gabriel Castle Jackson Advertising Pty Ltd* v *Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321, what was described as a joint venture was held to be a partnership. That joint ventures have fiduciary relationships, inter se would seem to be essential for the efficacy of the device.

In the High Court of Australia case of *Jenyns* v *Public Curator (Q)*[4] Dixon CJ, McTiernan and Kitto JJ have this to say at p 133:

> We are not here dealing with any of the traditional relations of influence or confidence — solicitor and client, physician and patient,priest and penitent, guardian and ward, trustee and cestui que trust. It is a special relationship set up by the actual reposing of confidence. It is therefore necessary to see the extent and nature of the confidence reposed and whether it involved any ascendancy over the will of the person supposedly dependent on the confidence.

The judges here were talking about fiduciary relations between the parties. In the case of *James Birtchnell & Anor* v *The Equity Trustees, Executors and Agency Co Ltd & Anor*[5] Dixon J at p 407 explains the fiduciary relationship between partners and how the relationship is to be determined. This is what he says:

> The relationship between partners is, of course, fiduciary. Indeed, it has been said that a stronger case of fiduciary relationship cannot be conceived than that which exists between partners. 'Their mutual confidence is the life-blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on' (per Bacon VC in *Helmore* v *Smith* (1890) 15 App Cas 223 at p 225; (1886) 35 Ch D 436 at p 444). The relation is based, in some degree, upon a mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only. In some degree it arises from the very fact that they are associated for such a common end and are agents for one another in its accomplishment. Lord Blackburn found in this consideration alone sufficient reason for the fiduciary character of the partnership relation (*Cassels* v *Stewart* (1881) 6 App Cas at p 79). *The subject matter over which the fiduciary obligations extend is determined by the character of the venture of undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued by the firm.* Once the subject matter of the mutual confidence is so determined, it ought not be difficult to apply the clear and inflexible doctrines which determine the accountability of fiduciaries for gains obtained in dealings with third parties. (Emphasis added.)

That passage was approved by Lord Wilberforce in the case of *New Zealand Netherlands Society Oranje Incorporated* v *Kuys & Anor.*[6] At p 1226 Lord Wilberforce says, after quoting the relevant passage of Dixon J's judgment:

> This was said in the context of a partnership but the principle must be of general application.

We would, with respect, accept this proposition which goes to show that if the agreement of 2 October 1980

entered into by the litigating parties is indeed a joint venture agreement then their relationship is a fiduciary one. The question of the extent of the fiduciary obligations in this case, therefore, cannot be determined by submissions alone before us but must be ascertained from oral evidence as well as minute scrutiny of the relevant documents. The subject matter raised in paras (v) and (vi) relating to the breach of fiduciary duties must, of necessity, be so determined. We would on this point quote Jenkins CJ in *Tufton* v *Sperni*[7] at p 530:

> ... It must be shown that the transaction in question did in fact arise out of some special relationship between the parties and that the relationship was a fiduciary one. Moreover, it must be shown not merely that there was a fiduciary relationship of some sort, but that the fiduciary relationship was of such a character as to warrant the interference of the court. (*In re Coomber* [1991] 1 Ch 723.)

Such matters as these must be decided at the trial proper and not to be dealt with under O 33 r 2. Perhaps, it would be enlightening if we say a few words on the meaning of the term 'cause of action'. In *Cooke* v *Gill*,[8] Bovill CJ at p 116 defines 'cause of action' as follows:

> Cause of action has been held from the earliest times to mean every fact which is material to be proved to entitle the plaintiff to succeed — every fact which the defendant would have a right to traverse.

In *Read* v *Brown*[9] at p 131 Lord Esher MR has this to say on the real meaning of the phrase 'cause of action':

> ... it has been defined in *Cooke* v *Gill* LR 8 CP 107 to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

The modern definition of 'cause of action' is, as stated in *Letang* v *Cooper*[10] at pp 242-243 per Diplock LJ, simply a factual situation the existence of which entitles a person to obtain from the court a remedy against another person.

In the present appeal several issues which we have picked out of the statement of claim to be relevant for the purpose of this appeal in fact have been traversed by the appellant in the amended statement of defence. The existence of representations of Tan Sri Ibrahim bin Mohammed and Chan Teik Huat which induced the respondent to enter into the joint venture agreement, the existence of a collateral warranty and the fiduciary relationship between the parties are issues which cannot be decided by recourse to O 33 r 2 read together with O 18 r 11 of the Rules of the High Court 1980, but are issues that must be proved by extrinsic evidence. As such, these are matters that ought to be tried at the trial proper. At this juncture it is pertinent to quote Sachs LJ in the case of *Radstock Co-operative & Industrial Society Ltd* v *Norton-Radstock Urban District Council*.[11] At p 632 Sachs LJ says:

> In the category of cases which come before the courts in an unsatisfactory form, the one now under consideration ranks high. Any preliminary issue which falls to be tried in the course of an action should always be one in which great care is taken to ensure that the issue presented for decision is well-defined and that the facts upon which it has to be considered are clearly ascertainable. In the present case there is not simply a single point for consideration but a whole series, and no such care was taken as regards any of them; moreover, when the pleadings came to be amended in the middle of the trial before the judge at first instance, the result was to make the matters less rather than more clear.

This is an apt quotation applicable in the present appeal. The issues in this case are riddled with complexities and the facts are in dispute so that to have recourse to O 33 r 2, in our view, should not be had in the first place. In this respect, the observation of Lord Evershed MR in *Windsor Refrigerator Co Ltd* v *Branch Nominees Ltd*[12] at p 396 is appropriate to show that under certain circumstances O 33 r 2 is not the correct procedure to adopt:

> ... I repeat what I said at the beginning, that the course which this matter has taken emphasizes, as clearly as any case in my experience has emphasized the extreme unwisdom — save in very exceptional cases — of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasizes the teaching) that the shortest cut so attempted inevitably turns out to be the longest way round.

Although learned counsel for the appellant has vigorously and persuasively argued this appeal, we are unable to agree with him for the reasons we have explained above. We would, on this ground, dismiss the appeal on the first objection.

The second preliminary objection raised by the appellant is the question of the application of cl 23 of the joint venture agreement which provides for reference to arbitration in the case of any dispute or difference with regard to any clause, matter or thing whatsoever or the operation or construction thereof or any matter connected with the agreement, or the rights, duties or liabilities of any of the parties. Clause 23 reads:

> If any dispute or difference shall arise between the parties hereto touching any clause matter or thing whatsoever herein contained or the operation or construction thereof or any matter or thing in any way connected with this agreement or the rights duties or liabilities of any party under or in connection with this agreement then and in every such case the dispute or difference shall be referred to a single arbitrator in case the parties agree upon one (1) and otherwise to two (2) arbitrators, one (1) to be appointed by each party and in either case in accordance with the subject to the provisions of the Arbitration Act 1952 or any statutory modifications or re-enactment thereof for the time being in force.

This is a normal arbitration clause and there is nothing unusual about it. It must be stated from the outset that cl 23 of this agreement does not contain what is known as the '*Scott* v *Avery* clause'. Therefore, any authorities on *Scott* v *Avery* clause cases will not be relevant in this appeal. The appellant's argument is that since the respondent has never referred his disputes to arbitration as required in cl 23, then under the law if he does not do so he does not have a cause of action. This argument smacks of the *Scott* v *Avery* clause situation whose effect is that no action lies for breach of contract until the matters in dispute have been submitted to arbitration unless the condition has been waived by the party relying on that clause.

To support his argument learned counsel for the appellant cited the case of *Dobbs* v *The National Bank of Australasia Ltd*[13] at p 652 and *Booker* v *Wilson.*[14] With respect to learned counsel, *Booker* v *Wilson*[14] can clearly be distinguished on the facts of that case which bear no similarity to the present appeal. That case deals with an incomplete agreement on the question of the amount of rent on the renewal of a lease. A term of the agreement in that case provides that performance of the further application to renew the lease is conditional on the rent being fixed. It was decided in that case that there is an implied term in the lease agreement that the rent is to be referred to an arbitrator.

In his written submissions learned counsel for the appellant quoted an extract of the observations of Rich, Dixon, Evatt and McTiernan JJ in *Dobb*'s case[13] which reads:

> Parties may contract with the intention of affecting their legal relations, but yet make the acquisition of rights under the contract dependent upon the arbitrament or discretionary judgment of an ascertained or ascertainable person. Then no cause of action can arise before the exercise by that person of the functions committed to him. There is nothing to enforce; no cause of action accrues. But the contract does not attempt to oust the jurisdiction. (*Scott* v *Avery* (1856) 5 HLC 811).

This extract is applicable to the *Scott* v *Avery* clause situation but is not an authority on the question whether the parties to an agreement are precluded from having recourse to the court when there is a provision for reference to arbitration a s in cl 23 of the joint venture agreement in this case where it does not stipulate that the parties unequivocably agreed that there shall be no right of action whatever till the dispute has been referred to arbitration. Therefore, with respect, this observation is not relevant to our case but, on the contrary, the decision in *Scott* v *Avery*[15] supports the respondent's case.

The real question for our determination is whether in the face of the provision of cl 23 the respondent is entitled in law to go to court instead of referring the dispute to arbitration, considering that it does not contain the '*Scott* v *Avery* clause'. *Dobb*'s case[13] itself would provide an answer to this case, particularly the part of the judgment which reads:

> What no contract can do is to take from a party to whom a right actually accrues, whether *ex contractu* or otherwise, his power of invoking the jurisdiction of the courts to enforce it. (*Kill* v *Hollister* (1746) 1 Wils 129); *Thompson* v *Charnock* (101 ER 1310); *Czarnikow* v *Roth, Schmidt & Co* [1922] 2 KB 478.) Accordingly, a contract providing for arbitration did not, apart from statute, prevent the institution of an action or suit, even although an actionable breach of contract was committed by the refusal to refer. (*In re Smith & Service and Nelson & Sons* (1890) 25 QBD 545 at p 544, per Bowen LJ.) But if, before the institution of an action, an award was made, it governed the rights of the parties and precluded them from asserting in the courts the claims which the award determined. By submitting the claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them. That authority enables him to extinguish an original cause of action.

This observation clearly supports the proposition that the respondent can still go to court, provided before the institution of an action, no award had been made by an arbitrator. In any case, cl 23 is never intended to oust the jurisdiction of the court under any circumstances, and we agree that in this case it is not the appellant's case that the court's jurisdiction was thus ousted. *Chitty on Contracts* (26th Ed) Vol I on general principles can throw some light on this aspect of the appeal. In para 1072 under the heading 'Resort to court proceedings' it says:

> If, contrary to an agreement to refer a matter to arbitration, one party resorts to proceedings in an English court in respect of that matter, the appropriate course is for the other party to apply for a stay of those proceedings. There is no principle that requires arbitration proceedings to terminate if a party to the arbitration resorts to court proceedings. Nor does resort to court proceedings by a party of itself constitute a repudiation of the arbitration agreement although it might do so if he thereby unequivocally demonstrates an intention to renounce or abandon the agreement.

From what we have said earlier on in the judgment it is indisputable that the appellant did not object to the recourse to court by the respondent but went along throughout, not only filing affidavits in reply to the affidavits of the respondent when they filed the issues as ordered by Razak J but also filing the statement of defence and counterclaim. Such a conduct must, by its very nature, amount to a waiver of the rights of the parties to go to arbitration. Neither did the appellant have recourse to s 6 of the Arbitration Act 1952 (Act 93) to apply for a stay of the proceedings thereby reinforcing the argument that it had abandoned its rights to go to arbitration, but submitted itself to the jurisdiction of the court. In any event, even if the appellant were to apply for stay of the proceedings in the High Court under s 6 of the Arbitration Act 1952, his application

would fail for the reason that he had taken various steps in the proceedings, and even had agreed for the case to be set down for trial 30 days from the date of the High Court order dated 19 June 1987. Under the circumstances, *Heyman & Anor* v *Darwins Ltd*[16] does not apply and can be clearly distinguished from this case. On the other hand, the case of *West London Dairy Society Ltd* v *Abott*,[17] is very much in point. The learned judge, therefore, is perfectly right when he rejected this objection and we agree wholly with him on this issue.

Although the learned judge in the court below had not dealt with the various issues before him in detail, we, however, agree with his conclusion that the two objections should be dismissed. Under the circumstances, in the light of our observations in this judgment, we would dismiss this appeal with costs. The deposit is to be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Mohamed Ismail & Co; Wan Majid & Mano.*

Reported by *Prof Ahmad Ibrahim*

Malayan Prestressed Concrete Strand Manufacturing Sdn Bhd (Dalam Penerimaan) & Satu Yang Lain lwn Malaysian Ropes Sdn Bhd

MAHKAMAH TINGGI (IPOH) — SAMAN PEMULA NO 24-885-90
ABDUL MALEK H
15 MEI 1991

Undang-Undang Tanah — Kaveat — Kaveat dimasukkan oleh pemegang saham terbesar penghutang yang juga penjaminnya ke atas hartanah penghutang — Penghutang dalam penerimaan — Permohonan oleh penerima dan pengurus untuk kaveat itu dimansuhkan atau diketepikan — Prinsip-prinsip perlindungan kepentingan oleh sistem kaveat

Kontrak — Jaminan dan tanggung rugi — Hak subrogasi kepada penjamin — Tidak timbul selagi penjamin tidak membayar balik hutang kepada pemiutang atau membuat deposit wang yang mencukupi dalam mahkamah — Mahkamah tidak boleh mengiktiraf defendan sebagai mempunyai kepentingan untuk memasukkan kaveat

Melalui saman pemula ini, plaintif kedua yang bertindak sebagai penerima dan pengurus plaintif pertama yang kini dalam penerimaan memohon mendapat perintah bahawa kaveat persendirian yang dimasukkan oleh defendan pada 14 April 1990 ke atas hartanah pegangan penghutang (kemudian disebut 'hartanah itu') dimansuhkan atau diketepikan. Hartanah itu dimilik daftar oleh plaintif pertama yang pada 7 Januari 1982 dan 8 Januari 1985 telah mencagarnya kepada Amanah Merchant Bank Bhd (kemudian disebut 'AMBB') melalui debentur dan debentur tambahan masing-masing. Butir-butir mengenai cagaran tersebut telah didaftarkan pada 1 Mac 1982 di Jabatan Pendaftaran Syarikat. Cagaran tersebut juga telah didaftarkan mengikut peruntukan Kanun Tanah Negara 1965 (kemudian disebut 'Kanun') pada 10 Ogos 1987. Seterusnya, pada 29 November 1988, AMBB telah melantik plaintif kedua sebagai penerima dan pengurus.

Defendan yang merupakan pemegang syer terbesar plaintif pertama dan penjamin untuk pinjaman yang diberi oleh AMBB telah memasukkan kaveat persendirian ke atas hartanah itu pada 14 April 1990. Defendan mencabar amaun yang dituntut oleh AMBB terhadapnya sebagai penjamin dan berpendapat bahawa ia berhak mengambil alih kedudukan AMBB jika wang tersebut dibayar kelak yang bermakna bahawa ia akan berhak ke hartanah itu. Alasan yang kedua ialah tiada penilaian yang tepat dan sempurna dibuat oleh pihak plaintif-plaintif untuk hartanah itu dijual secara triti persendirian kepada pihak ketiga dan oleh kerana ini akan merugikan defendan. Defendan telah memohon injunksi terhadap kedua-dua plaintif bagi melarang mereka menjual hartanah itu. Malangnya, tiada keputusan telah diumumkan selama setahun sungguhpun permohonan injunksi telah didengar.

Diputuskan, membenarkan permohonan plaintif-plaintif:

(1) Isu yang timbul hanya soalan undang-undang sama ada dalam keadaan demikian, pihak defendan mempunyai kepentingan yang boleh didaftarkan supaya kaveat mereka patut dibiarkan sehingga perbicaraan jika perlu. Tidak dinafikan bahawa sistem kaveat yang terdapat di negara ini berdasarkan prinsip bahawa ianya wujud untuk perlindungan kepentingan yang telah dibuktikan atau sebaliknya dan juga kepentingan yang masih belum menjadi kepentingan sebenar.

(2) Dalam kes ini, AMBB adalah pemiutang dan defendan adalah penjamin. Oleh itu, pihak pemiutang berhak mengambil apa-apa tindakan bagi mendapatkan wangnya balik. Di sini mereka telah menuntut wang pinjaman dari defendan dan juga telah menyempurnakan perjanjian jual beli dengan pihak ketiga dan kedua-dua tindakan tersebut jatuh di bawah bidang kuasa mereka.

(3) Subrogasi tidak terpakai dalam kes ini kerana defendan masih belum lagi membayar wang yang dituntut oleh AMBB. Tiada apa-apa wang didepositkan ke dalam mahkamah. Defendan pula telah mengaku ia memang mempertikaikan jumlah yang dituntut. Jika wang yang mencukupi telah didepositkan ke dalam mahkamah sungguhpun defendan mempertikaikan jumlahnya, atau tuntutan sepenuhnya telah dibayar kepada AMBB, mahkamah bolehlah mengiktirafkan defendan sebagai mempunyai kepentingan untuk memasukkan kaveat ini tetapi dalam hal kedudukan kes ini, pada pendapat mahkamah kepentingan ini belum lagi dapat dikatakan sudah wujud.

(4) Lagipun pemiutang telah selesai mengambil tindakan menjual hartanah itu kepada pihak ketiga secara triti persendirian. Sememangnya plaintif kedua berhak berbuat demikian di bawah debentur dan mereka juga telah berpuashati bahawa harga jualan adalah memadai. Oleh kerana perjanjian jual beli telahpun dilaksanakan, mahkamah berpendapat bahawa pihak defendan sudah terlambat untuk mengambil apa-apa tindakan lagi sungguhpun ia boleh dikatakan mampu membayar tuntutan sepenuhnya pada bila-bila masa.

(5) Oleh itu, mahkamah berpendapat bahawa berdasarkan fakta-fakta kes ini dan prinsip undang-undang yang telah dirujuk, defendan tidak mempunyai apa-apa kepentingan di atas hartanah itu yang menimbulkan soalan serius yang perlu dibicarakan. Seterusnya, soalan imbangan kemudahan untuk mengekalkan kaveat berkenaan tidak timbul langsung.